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No. 518

In the

Supreme Court of the United States

OCTOBER TERM, A.D., 1969

JOSEPH HENDLER, a minor, by ABRAHAM HENDLER, his father and next friend, and ESTHER HENDLER, a minor, by ABRAHAM HENDLER, her father and next friend,

Petitioners,

vs.

MIRIAM WOLOZIN, NAT WOLOZIN, CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, and HARRY J. ZANOTTI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, Joseph Hendler, a minor, by Abraham Hendler, his father and next friend, and Esther Hendler, a minor, by Abraham Hendler, her father and next friend, pray that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, entered in the case of *Joseph Hendler, a minor, by Abraham Hendler, his father and next friend, and Esther*

Hendler, a minor, by Abraham Hendler, her father and next friend, Plaintiffs, v. *Miriam Wolozin, Nat Wolozin, Chicago Transit Authority, a Municipal Corporation, and Harry J. Zanotti, Defendants,* which judgment was entered on January 20, 1969.

CITATIONS TO OPINION BELOW

The Opinion of the Appellate Court of Illinois, First District, printed in Appendix A hereto, is reported as an abstract opinion in 105 Ill. App. 2d 132, 245 N.E. 2d 74.

JURISDICTION

Judgment was entered in the Appellate Court of Illinois for the First District on January 20, 1969. No Petition for Rehearing was filed. A Petition for Appeal As a Matter of Right or, in the alternative, for Leave to Appeal, was denied by the Supreme Court of Illinois on May 26, 1969. A motion for reconsideration of the order denying said Petition was denied on June 17, 1969. The jurisdiction of this Court is invoked under U.S. Code, Title 28, Section 1257(3), providing for review of decisions of a state court by this Court by writ of certiorari.

QUESTIONS PRESENTED

1. Are civil proceedings in a state court involving minors to be measured only against adult standards.
2. May minors in civil litigation in a state court be prejudiced by undue reference to their religion without court intervention.
3. May a state court of appellate jurisdiction apply an adult standard in the review of court proceedings concerning minors.
4. Do "due process" concepts of fairness require close supervision of trials concerning a minor's rights.
5. Is there "equal protection" when a child of tender years is held to the same standard as an adult.

STATEMENT

Plaintiffs, Joseph Hendler and his sister, Esther, are minors. At the time of the occ rrence herein they were, respectively, seven years and twelve years of age. They both attended Arie Crown Hebrew Day School, a Hebrew parochial school. On January 24, 1962, they were returning home from school with some of their schoolmates on a bus owned by defendant Chicago Transit Authority ("CTA") and driven by defendant Harry J. Zanotti. After alighting from the bus at an intersection, and while attempting to cross the street at a crosswalk, while the bus remained stopped, they were struck by an automobile driven by defendant Miriam Wolozin and owned by her husband.

Although Esther "was not seriously injured", "Joseph suffered extremely serious injuries that included two surgical removals of brain tissue and permanent brain damage." (App. Ct. opinion)

The evidence on liability was in sharp conflict. Joseph remembered nothing of the occurrence. Esther and three classmates from Arie Crown, two of whom were passengers on the bus and the third who alighted with plaintiffs, testified that before plaintiffs and the third child started across the street, the bus driver motioned to them to go ahead. Plaintiffs' evidence was that the rear end of the bus stuck out at an angle into the center of the street. As the children began to cross the street in obedience to the driver's signal, defendant Wolozin's vehicle came around the bus "very fast" and struck the children while they were in the crosswalk.

Defendants CTA and Zanotti denied that Zanotti motioned the children to cross the street or that the bus was

at an angle. Defendant Wolozin denied she was traveling at an excessive rate of speed. Zanotti, Wolozin and a witness, Levey, testified that the children darted into the street in front of the bus. Another adult witness, Berzon, a passenger on the bus, did not see the accident nor did she see Zanotti wave his hand.

Five physicians testified for plaintiffs concerning Joseph's brain injuries. Defendants produced no medical witnesses.

The jury found for defendants and judgment was entered in their favor. The Appellate Court affirmed. However, the Appellate Court found that "much of the argument of the defense was improper" and that there were other trial errors. The Supreme Court of Illinois refused to hear plaintiffs' appeal.

The improprieties in the argument and other trial errors give rise to this Petition. Certain of these errors will be set out in that portion of this petition entitled "Reasons for Granting the Writ."

REASONS FOR GRANTING THE WRIT

The writ herein prayed for should be granted as the courts of Illinois have permitted a trial concerning a minor to be conducted so as to deprive said minor of the basic requirements of due process and fairness.

Personal injury cases tried in state courts ordinarily do not reach this Court. Constant application of customary procedures, however, may cause a local forum to lose sight of their effect. Indiscriminate adherence to customary practice may seriously impinge upon an individual's right to a fair trial. This Court by its very nature is removed from both trial courts and local pressures and

interests. Thus, this Court may reflect upon local practice without losing sight of the need to insure to each individual, in his own particular circumstance, a fair trial.

What may be a fair trial for one is not necessarily a fair trial for another. This Court has recognized that broad concepts such as "fair trial" can be meaningful only if refinements are made in individual cases. Of late, the Court has been concerned with the application in judicial proceedings of general rules and standards to minors. That is precisely what this case concerns.

This Court, in cases concerning juveniles, has emphasized that " 'the basic requirements of due process and fairness' " must be satisfied in proceedings concerning minors. See *Re Gault,* 387 U.S. 1, 12, 18 L. Ed. 2d 527, 538 (1967); *Kent* v. *United States,* 383 U.S. 541, 16 L. Ed., 2d 84 (1966). Although the instant case does not concern juvenile court proceedings, similar principles must apply in all civil proceedings to avoid violation of the equal protection and due process clauses of Section 1 of the 14th Amendment of the United States Constitution.

In the instant case, the Illinois courts have held, in effect, that proceedings concerning children must be measured only against adult standards. Where parties (such as adults and children) are concededly unequal, there cannot be equal protection if an identity of standard is applied. Due process concerns fairness and it is inherently unfair when a child of tender years is subjected to and bound by a trial in which a reviewing court concedes that much error has occurred.

Both our state and federal courts have long recognized that children, because of their tender years, are not the

equal of adults. Equality of judicial proceedings has been achieved through careful supervision by the courts where such proceedings concern minors. Here the proceedings were not carefully supervised nor were the rights of the minor plaintiffs properly safeguarded. Hence, these minor plaintiffs have been deprived of their right to a fair trial and the equal protection of the laws.

In this case:

1. Both the trial and appellate courts have sanctioned unnecessary references to the religion of parties, witnesses and even the inhabitants of the neighborhood in which an accident occurred. These references, in part, have been permitted without regard to substantiation in the evidence;

2. Both the trial and appellate courts have sanctioned highly improper and prejudicial inferences to be drawn in closing argument, drawing heavily upon religious overtones;

3. Both the trial and appellate courts have permitted what the Appellate Court concedes to be a cumulation of error but have disregarded this cumulative error in determining whether a child is entitled to a new trial;

4. Both the trial and appellate courts have sanctioned argument that a permanently brain-damaged child should be compelled to be present throughout a three-week trial so that he might be observed by the jury;

5. The Appellate Court has applied to minor plaintiffs an adult standard in the review of court proceedings concerning these minors.

Individually or in combination, the above recited errors have prejudiced the minor plaintiffs in this case.

Moreover, the record demonstrates that the trial judge did not understand his obligation to protect minor plaintiffs. The following colloquy occurred in chambers (Abst. 805):

> "[Plaintiffs' counsel]: If your Honor, please, is it any more prejudicial [to call defendants' doctor] than when [defense counsel] under Section 60 called [plaintiffs' father] to the stand to show that the Rabbi's son was the person who brought him to my office, or is it any more prejudicial than when [defense counsel] asked Mrs. Wolozin what kind of a neighborhood this is? It is ninety percent Jewish.
>
> . . . Those things did not go to the truth of a material issue.
>
> The Court: As I remember, however, . . . there were no objection to that.
>
> [Defense counsel]: There were not.
>
> The Court: *I would have sustained the objection, I thought so at the time. I remember very vividly I did not see how they were material. . . .*"

The above excerpt demonstrating the trial judge's failure to act when confronted by improper and prejudicial interrogation concerning religion in this trial involving minors, makes clear his determination to treat the children here as if they were adults.

Nowhere was the lack of concern concerning these minors more apparent than in the treatment by the court of the religious issue.

Plaintiffs attended a Hebrew parochial school. Plaintiffs' occurrence witnesses were their classmates. Plaintiffs and these witnesses were all children. Hence, to establish their competence and credibility, it was neces-

sary to determine their understanding of the oath. This required, as is customary in cases involving minor witnesses, interrogation regarding each child's religious training to demonstrate the child's moral understanding of the oath. Moreover, in this case, the particular brain injury suffered by Joseph caused a form of aphasia which rendered it impossible for him to remember or learn Hebrew or Yiddish, both subjects which he studied in the parochial school. Thus,

> (1) as plaintiffs and their occurrence witnesses all attended a Hebrew parochial school;
>
> (2) as plaintiffs and their occurrence witnesses were minors of the Jewish faith whose credibility and competence had to be determined; and
>
> (3) because of Joseph's particular type of brain injury,

the religious background and scholastic training of plaintiffs and their witnesses had to be brought into this case.

However, defendants in argument and examination went far beyond proper bounds in their treatment of this religious element to the prejudice of the minor plaintiffs and to the administration of justice.

Counsel for defendant Wolozin immediately after commencement of his closing argument stated:

> "Martin Levey [a defense witness] is of the same faith [as plaintiffs], goes to the same schools. Is he saying that Martin Levey, although he is of the same faith, is not to be believed? Mind you, he [Levey] did not have any choice in this case. Mr. Wright [counsel for CTA] subpoenaed him. He had to come. He did what he could for the plaintiffs. He said he did not have any memory. Isn't that what he said? He said,

'I don't remember anything.'. You can imagine the difficulties that defendants have encountered in trying to get somebody in here to testify."

Counsel continued later in his closing argument:

"So we have two persons, now, as against that. We have first Martin Levey, who was subpoenaed by Mr. Wright, a man who was raised in the same tradition and has the same traditions that counsel talks about, that the plaintiffs have—the same religious training, so far as we know here. He is going to a Jewish school at the present time, or so he testified here—"

Counsel for CTA, in his closing argument, stated:

"I put on the stand, for your benefit, Mrs. Berzon. Now, here is a lady who was also forced to come in and a lady of the same nationality as the plaintiffs."

The Appellate Court considered these arguments and stated in its opinion:

"Counsel for both defendants also commented on the reluctance of the witnesses Martin Levey and Esther Berzon to testify . . . the defense further brought out that both Levey and Mrs. Berzon were Jewish . . . *certainly, much of the argument of the defense was improper* but objections to it were promptly sustained by the trial court." (Emphasis supplied.)

The vice of defendants' argument was not completely apparent to the Appellate Court. *There is absolutely no evidence in the record to indicate either the religion or nationality of Levey or Berzon.* In fact Levey testified that he was attending the Central *Y.M.C.A.* School.

The argument of defendants, wholly unrelated to the evidence and solely concerning religion, and appealing to

possible religious prejudice, is obviously improper. The confusing effect of the argument on the jury is demonstrated by the fact that the Appellate Court in considering this case on review was also confused and merely considered the fact of the alleged "Jewishness" of Levey and Mrs. Berzon to be irrelevant to the issues of the case. Not only was the religion of these witnesses irrelevant to the preceedings but their religion, whatever it was, does not appear in the evidence. Reference to these witnesses as Jewish and to their so-called reluctance to testify served only to buttress the claim by defendants of a conspiracy against them by persons of the Jewish faith.

This conspiracy theory was used by both defendants with damaging effect.

Counsel for defendant Wolozin first argued:

> "Mr. Hubbard: Did we have the benefit of someone collecting all of these people together right after the accident and having a conference with all of them? And who presided at the conference? I don't need to tell you.
>
> "Why was it necessary to have a conference in what Counsel calls a house of worship or the akin to it? Why was that necessary, Why was the head of that institution's son the attorney in this case?"*

• • •

* There is no evidence that the head of Arie Crown Hebrew Day School was the father of an attorney in this case. The referring attorney whose name appeared on the notice given to the Chicago Transit Authority of the accident was Solomon Gutstein. His father is, in fact, a rabbi. Rabbi Gutstein, the pastor of the congregation at which plaintiff's father was employed, had referred plaintiff to Dr. Perlstein, a neurological pediatrician.

The record shows that the principal of Arie Crown Hebrew Day School in January, 1962 was Rabbi Sholem

"Now, counsel [for plaintiffs] has had a group of them. He had Yetta Scheinbaum, Pesal Rand, Janet Guttman . . . The only thing that Yetta testified to was that she was at the meeting at the Arie Crown School, and it was either she or one of the others that said there were at least seven of them there."

Counsel for the CTA developed this theme:

"The only time we got involved in this affair, Zanotti and the CTA, was some two weeks later [after the accident], when there was a meeting at the Arie Crown School, where some 8 or 12 children were collected together; and there, for the first time, was born the idea that Zanotti waved these children across the street. There, I say to you, men and ladies, there was the inception of the idea of bringing Zanotti into this case."

The evidence in this case does not permit this type of argument. The evidence is as follows:

On cross-examination by counsel for the CTA, Miss Scheinbaum testified:

"Q. Did you have a meeting at the Arie Crown School with a number of other children, regarding this accident?

A. Did I talk to other children about it, you mean?

Q. No. I am talking about at school, were you collected together in school?

A. No.

Q. Were you interviewed at school by some person?

A. Yes.

---

* (Continued)
Rephun. The record does not show that Rabbi Gutstein had any relationship to the school or that Rabbi Rephun had any relationship to any party to this case or any attorney involved herein.

Q. Was there a number of other children interviewed at the same time?
A. Yes.
Q. You were all in the same room, right?
A. No. One of us went at a time?

Later, defense counsel continued:

"Q. Who was it that notified you that they wanted to talk to you were in the Arie Crown School; after the accident?
A. I don't understand the question. Who came up and told us?
Q. You said that somebody interviewed you at the Arie Crown School.
A. Yes.
Q. Who was it that notified you that you were to be interviewed?
A. The secretary of the office.
Q. By the way, the principal of that school, is that Rabbi Shadith?
A. At that time, he was Rabbi Rephun.

* * *

Q. Was he present when you were interviewed?
A. I don't remember."

The witness, Pesal Rand, testified on cross-examination by counsel for the CTA:

"Q. By the way, you said something about being interviewed in school by someone, is that right?
A. Yes.
Q. How long was that after the accident?
A. Shortly after.
Q. When you say shortly, how long a period of time afterwards?
A. A few weeks.
Q. Was that from somebody representing the Hendlers?
A. I think so.
Q. Was that for the other groups of children there?

A. Yes.

Q. About how many of you children were gathered together when you were interviewed?

A. We weren't together.

Q. Well, this group of children, where were they?

A. They were in the office.

Q. You were all summoned into an office?

A. Yes.

Q. About how many of you children were called into the office?

A. I don't know.

Q. About how many?

A. Seven."

There was no testimony concerning a group meeting at the Hebrew parochial school attended by the children or that the children's testimony concerning Zanotti was induced or fabricated. The children were called individually. The inferences drawn by defendants concerning an alleged group meeting at the parochial school were unwarranted and unfounded.

Defendants were not only concerned with the religious faith of the independent witnesses and the alleged conspiracy at the parochial school. The nationality of the people living in the neighborhood where the accident occurred also appeared of interest to them.

On examination of the co-defendant Wolozin by counsel for the CTA, the following occurred:

"Q. You said that you were familiar with the neighborhood.

A. Yes, sir.

Q. What is the general type of people who live in that neighborhood?

A. Are you talking about people or nationality?

Q. Nationality.

A. It is about, I would say, about 90% Jewish in that neighborhood.

Mr. Wright: I think that is all I care to ask you, . . ."

Statements, argument or interrogation by counsel in the trial of a civil action concerning the nationality or religion of a party or witness or relating to nationality or religion generally, if irrelevant and unjustified and calculated or tending to arouse national or religious prejudice or feeling are universally condemned. Such statements, to be objectionable, may be indirect or implied, as well as direct or express. See Annotation, Statement by counsel relating to race, nationality, or religion in civil action as prejudicial, 99 A.L.R. 2d 1249, 1253-1255.

In the instant case, there were, unfortunately, religious overtones. These were necessary to a degree because of the particular circumstances of plaintiffs and the nature of the injuries. However, there were also many immaterial references to religion. This served to divert the jurors from the real issues.

The state courts ignored the unwarranted intrusion into religion. The trial was permitted to proceed and a minor's rights to be adjudicated without intervention.

Illinois courts have frequently stated that they must guard carefully the rights of minors so that they are not prejudiced. Even if objection to error is not made on behalf of a minor, the court must act, *sua sponte,* to protect him. See, for example, *Muscarello* v. *Peterson,* 20 Ill. 2d 548, 555 (1960).

Obviously, the expressed principle has not been applied in the instant case, thus seriously prejudicing the minors here in the presentation of this claim and depriving them of a fair trial.

Equality for minors must mean that they cannot be treated in all instances as adults. They must be protected by the courts. Such is the nature of the constitutional guarantee.

In the instant case, this Court may, if this Petition is granted, express its concern for the rights of juveniles in all civil cases just as this Court has expressed itself concerning juvenile court proceedings.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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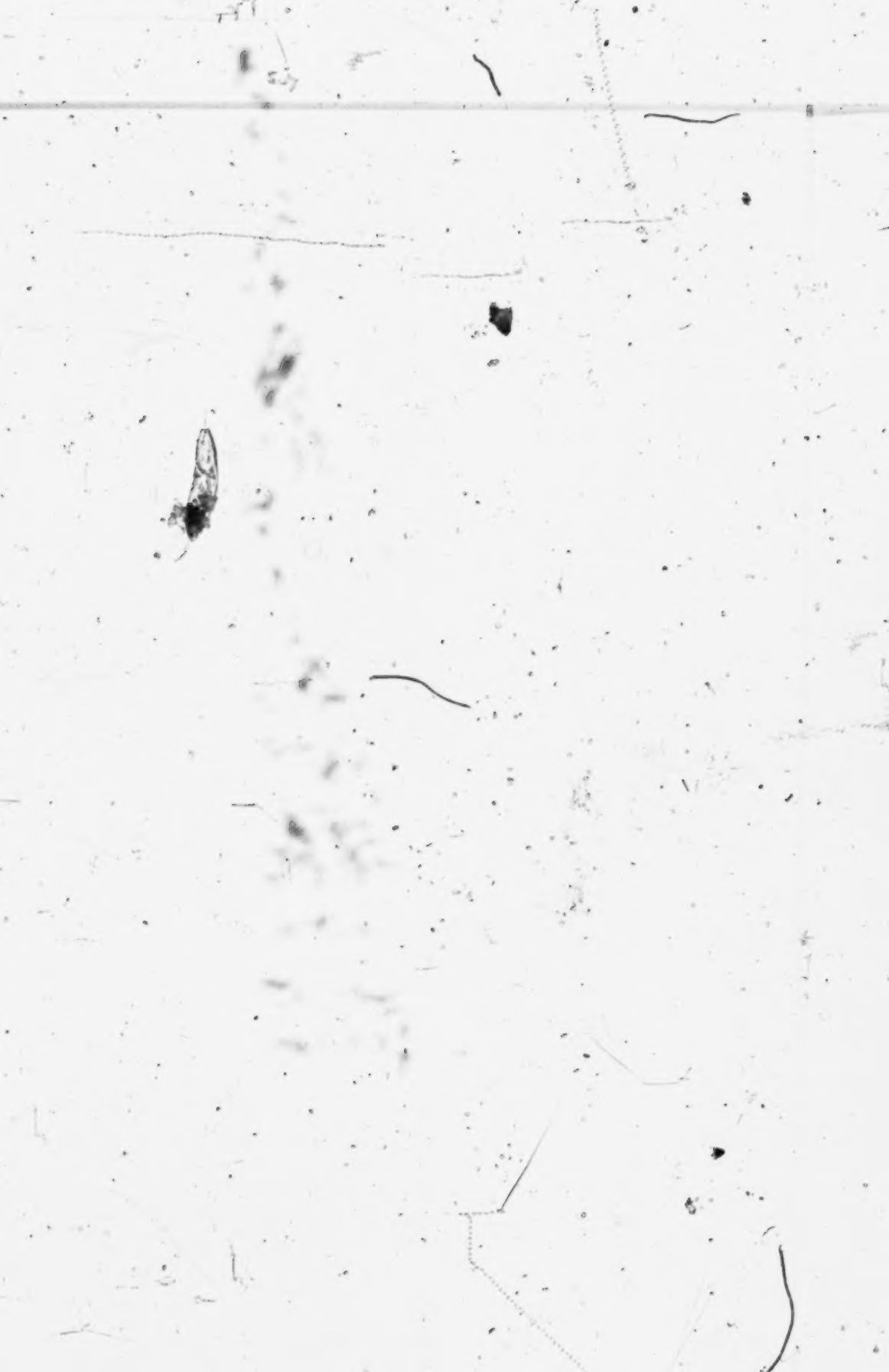

APPENDIX

OPINION OF THE APPELLATE COURT

Mr. Presiding Justice Abrahamson delivered the Opinion of the Court.

The plaintiffs appeal from an order of the Circuit Court of Cook County entered upon a jury verdict in favor of all defendants and a special finding that all defendants were not negligent and the denial of post trial motions. This appeal is based on the contention of the plaintiffs that they were denied a fair trial by the improper conduct of counsel for the defendants during the trial, improper final argument, and error by the trial court in the admission of certain evidence and the instructions to the jury.

On January 24, 1962, Joseph Hendler, then age 7 years, and his sister, Esther Hendler, age 12 years, were returning home from the Arie Crown Hebrew Day School on a bus owned by the defendant, Chicago Transit Authority, and driven by defendant, Harry J. Zanotti. The children had boarded the bus at the intersection of Foster and Kimball Avenues near the school. The bus proceeded north on Kimball Avenue to the intersection of Hollywood Avenue where it stopped south of the south crosswalk of Hollywood to permit passengers, including the Hendler children, to alight. Esther Hendler testified that she, Joseph, and a school friend, Judy Zimmerman, got off the bus at the front door, stepped on a snowbank on the south sidewalk east of the curb and stopped to allow the bus to go on before they crossed Kimball Avenue to the west on their usual route home. While they waited for the bus to pass, Esther saw the bus driver wave his hand to them to cross the street. Esther took Joseph's hand and began to cross the street with her brother to her right and Judy a step or two behind. She hesitated "a little past" the front corner of the bus to observe traffic from both directions and noticed the back end of the bus was

sticking out into the center of the street at an angle from the front and that a car was coming around the bus "very fast." At this moment, Esther heard the motor of the bus and thought she saw it begin to move and was "frozen" to the spot. The car driven by the defendant, Miriam Wolozin, struck her left hand and then the back of Joseph's head with the front right side. Judy Zimmerman testified to essentially the same facts.

Yetta Scheinbaum testified for the plaintiffs that she was a school mate of the Hendlers and was still on the bus after they got off. She saw the bus driver wave his hand and then heard him swear and other children on the bus say that the Hendlers were struck by a car. Pesal Rand, a student at the Chicago Jewish Academy, sat next to Yetta on the bus and also saw the driver motion with his hand for people to cross the street.

Miriam Wolozin was the only witness produced by the Wolozins. She stated that she was traveling north on Kimball Avenue going 15-20 miles an hour. She noticed the bus stopped at the intersection and proceeded to pass it on the left in the inner northbound lane at about the same speed. As she passed the bus into the crosswalk she saw "a flash on the right in front of the windshield on the right front fender". She stopped in the middle of Hollywood but then pulled across the intersection.

Harry Zanotti testified that he stopped the bus parallel and about 2-2½ feet from the east curb to permit his passengers to alight. He saw the Hendler children get off and attempt to climb the snowbank. They walked to the front of the bus and "then the girl threw her left arm around the little boy and they dashed across the street". He looked in his side view mirror and saw the Wolozin car coming up along the side of his bus at about 20 miles per hour and shouted "No, no, don't" before the impact. He denied that he waved to the children to cross.

Martin Levy was subpoened by the Chicago Transit Authority and testified that at the time of the accident he

was a student at the Y.M.C.A. School and was a passenger on the bus. When on the witness stand he did not recall the incident clearly until his recollection was refreshed by a statement he had given to an investigator shortly after the occurrence. He then recalled that he saw Joseph Hendler "dart" in front of the bus and into the side of the car. He also testified that he knew the Hendlers.

Esther Berzon sat right behind Zanotti at the time of the accident and noticed nothing in particular until she heard him say "Oh, no". She did not see the accident or Zanotti wave his hand.

Esther Hendler was not seriously injured by the accident but Joseph suffered extremely serious injuries that included two surgical removals of brain tissue and permanent brain damage.

Although this case is not appealed on the issue of the weight of the evidence, it is necessary to have reviewed these portions of the evidence to properly assess the nature of the plaintiffs' appeal.

During the cross-examination of Yetta Scheinbaum she testified that she had been interviewed in an office at Arie Crown School shortly after the accident and that other children had been interviewed at the same time. Pesal Rand stated the same thing and when asked by counsel for the Chicago Transit Authority if the interviewer was representing the Hendlers she answered "I think so".

In his final argument, counsel for the Chicago Transit Authority stated that it was during this "conference" at the school "was born the idea that Zanotti waved these children across the street". The plaintiffs maintain that this remark, together with certain other inferences made by the counsel for the Wolozins in regard to the interviews at the school, clearly implied that the school children had been induced to testify to a state of facts that were not true, i.e. subornation of perjury. Counsel for both defendants also commented on the reluctance of the wit-

nesses Martin Levy and Esther Berzon to testify and implied that Levy's memory of the events was perhaps influenced by his friendship with the Hendler family. The plaintiffs argue that these improper remarks charged them in the eyes of the jury with tampering with witnesses. The defense further brought out that both Levy and Mrs. Berzon were Jewish and since that fact was irrelevant to the issues of the case the plaintiffs feel it was for the purpose of creating the impression that the plaintiffs, the witnesses, including Levy and Esther Berzon, the medical experts and the plaintiffs' attorneys, all related by common religious and cultural backgrounds, had entered into an unholy conspiracy against the defendants and thereby clearly prejudiced the plaintiffs and denied them the fair trial to which they were entitled.

The record before us indicates that the trial was a lengthy and arduous one and that all counsel aggressively served the interests of their clients. In his final argument, counsel for the plaintiffs stated that the defense "developed" their "version" of the facts that Joe Hendler had run out in front of the bus and that "a lie has been used to create an issue of fact". Great emphasis on the religious background of the school children and their families was made by the counsel for the plaintiffs both in evidence and in final argument. Certainly, much of the argument of the defense was improper but objections to it were promptly sustained by the trial court. Ordinarily, the scope of final argument is within the judicial discretion of the trial court. *Jackson* v. *Whittinghill,* 39 Ill. App. 2d 315, 324. It is also the function of the trial court to determine if improper argument is of such a character, when considered with all the circumstances of the case as to prejudice the defeated party. *Eizerman* v. *Behn,* 9 Ill. App. 2d 263, 288; *Crutchfield* v. *Meyer,* 414 Ill. 210, 213, 214.

We do not feel that the plaintiffs were prejudiced in this case by the arguments of defense counsel when the record is reviewed as a whole. Certain portions of that argument were improper but were not sufficiently serious to warrant a retrial of the case.

Police Officer Bernard Leonard was assigned to make an investigation of the accident and testified for the plaintiffs. In order to refresh his recollection, he was permitted to examine the police report he had prepared from his investigation. The record indicates that during his testimony he held the original of the police report in his hand and that counsel for the plaintiffs held a photostatic copy. Leonard testified as to the position and description of the vehicles and was then asked "To whom did you talk? Do not tell us what anyone said." Leonard stated that he went into the bus and talked to the driver and a CTA supervisor and that "After talking to the bus driver I said I thought they were involved. . . ." He then talked to Miriam Wolozin and although admonished not to repeat the conversation he indicated on his report "what she saw prior to striking the two children, and the action of how far her car went after striking the children, how fast she was driving."

On cross-examination, counsel for the Wolozins asked to see the report held by Officer Leonard and was given a copy. The following colloquy then took place relative to the conversation with Miriam Wolozin:

> "Q. By the way, did she tell you whether or not she saw the youngsters before the impact?
>
> Mr. Karlin: Object to that, if the Court please, unless it is yes or no.
>
> The Court: I am going to let the witness answer that.
>
> The Witness: A. She said she saw them, yes.
>
> Mr. Hubbard: Q. How far away did she say they were when she saw them?
>
> Mr. Karlin: Object on the same ground, if the Court please.
>
> The Court: I am going to let the witness answer. I think we will allow him to answer these questions.
>
> The Witness: A. The driver said she saw them about five feet away from the front of her vehicle."

Counsel for Chicago Transit Authority asked Leonard if there was anything in his report to show they were involved in the accident to which he replied:

> "The Witness: A. There is nothing in my report that states that the CTA would be involved."

It is certainly true as contended by the plaintiffs that a police report is ordinarily not admissible in evidence as a violation of the prohibition against hearsay testimony. *Redding* v. *Schroeder*, 54 Ill. App. 2d 306, 314; *Johnson* v. *Plodzien*, 31 Ill. App. 2d 222, 227. However, the record here indicates that the witness testified directly from his report and the defense was entitled, and permitted, to cross-examine him as to its contents. The cross-examination as to the conversation with Miriam Wolozin was proper although it brought out certain self-serving statements since that conversation was brought out in the direct examination. Similarly, the conclusion of the witness that the Chicago Transit Authority was not "involved", otherwise completely improper, came into the case as a result of his testimony on direct examination that it was his original opinion that they were involved.

Finally, the plaintiffs argue that the instructions to the jury were improper in that they failed to instruct the jury as to the duty of care imposed on a minor. The Court gave four so-called "burden of proof" instructions, one in regard to each defendant, identical to the Illinois Pattern Instruction No. 21.02 that includes the statement "First that the plaintiff before and at the time of the occurrence was using ordinary care for his own safety." Although the Court had previously given plaintiffs' instruction No. 9, in the form of I.P.I. 10.05, properly defining the duty of care of a minor, the plaintiffs believe that the failure to specify the degree of care in each burden of proof instruction was reversible error since the jury would be confused by the inconsistent statements of law. We disagree. The jury was properly instructed as to a minor's duty of care and the subsequent instructions could in no

way be considered inconsistent or incorrect. To redefine that degree of care in the burden of proof instructions would have been at the least redundant and defeat the purpose of the pattern instructions to state the law as concisely and understandably as possible.

The other points raised by the plaintiffs in this appeal relate either to the improper conduct of defense counsel that we have already considered or to the medical evidence which, in view of the verdict, is not properly before this court.

For the reasons stated, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

MORAN and SEIDENFELD, JJ., *concur*.

SUPREME COURT, U. S.

FILED

SEP 19 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1969.

No. 518

JOSEPH HENDLER, A MINOR, BY ABRAHAM HENDLER, HIS FATHER AND NEXT FRIEND, AND ESTHER HENDLER, A MINOR, BY ABRAHAM HENDLER, HER FATHER AND NEXT FRIEND,

Petitioners,

vs.

MIRIAM WOLOZIN, NAT WOLOZIN, CHICAGO TRANSIT AUTHORITY, A MUNICIPAL CORPORATION, AND HARRY J. ZANOTTI,

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

The jury found both generally and specially for respondents upon the issue of liability (Rec. 293-300; Abs. 28). The jury specifically found that none of the defendants had been guilty of negligence causing injury to the plaintiffs (Rec. 293-300; Abs. 28).

Petitioners in their statement of the case assert that the evidence was in sharp conflict, but they do not make any such contention as a reason for granting certiorari, or in

connection with any of the reasons given by them for granting a writ of certiorari. Even had they done so (which is not the case), such contention would be unfounded.

Respondents show that the evidence clearly sustained the findings of the jury; no other findings would have been consistent with the course of justice, or the evidence.

The testimony overwhelmingly established that the accident took place simply because two young children (petitioners), with the impetuosity of youth, dashed across a street in front of a parked bus owned by one of the respondents and *into the side* of a passing automobile operated by another respondent.

The bus driver (one of the respondents), seeing the approaching automobile, shouted for the children to stop when he first saw them leave the curb and run across in front of the bus toward the automobile which was about to pass the standing bus. But, he shouted in vain (Rec. 2269; Abs. 751). The automobile was not going fast (Rec. 2269; Abs. 751). It was able to come to a complete stop within about 10 or 15 feet (Rec. 2077; Abs. 667).

The testimony of the bus driver that he shouted for the children to stop was attested by other witnesses. One was a bus passenger (Rec. 2171; Abs. 713). The other witness was not a passenger. The shout of the bus driver was in such a loud tone that it could be heard by the second witness who was across the street at the time (Rec. 2223; Abs. 732).

Petitioners' assertion that the evidence was in sharp conflict is clearly an after thought without any foundation. It is significant that they did not think enough of it to raise it as an issue in the Appellate Court.

ARGUMENT.

I.

PETITIONERS DO NOT RAISE ANY CLAIM THAT THEY WERE DENIED THE RIGHT TO BE HEARD OR THE RIGHT TO BE REPRESENTED BY COUNSEL. THEY RAISE ONLY ISSUES OF LAW AS TO ALLEGED IMPROPER RULINGS BY THE TRIAL JUDGE AND THE APPELLATE COURT UPON EVIDENTIARY AND PROCEDURAL QUESTIONS.

Two minors, hereinafter referred to as petitioners, brought this suit in the Circuit Court of Cook County, Illinois through their father as their next friend.

Petitioners were represented in the trial court, the Illinois Appellate Court and in the Illinois Supreme Court by a very competent lawyer of years of experience. He represents them in this court.

Thus, petitioners have been adequately represented at all times both by their able lawyer and their father. Consequently they raise no issue that they were inadequately represented.

Petitioners raise no claim that they were denied an apportunity to be heard. Nor could they, because they were given full opportunity to be heard in the trial court, the Appellate Court and the Illinois Supreme Court.

There is nothing unique about the case whatsoever. It is one for personal injuries. Except for the precise nature of the negligence charged, which is never the same in any two cases, it does not differ in its essential elements from the thousands of personal injury cases tried throughout this country every year, in many of which minors are parties.

It is well settled that the mere error of a trial judge in admitting evidence or entering judgment is not a denial of due process of law in violation of the Fourteenth Amendment (*Jones* v. *Buffalo Creek Coal Co.*, 245 U. S. 328-329, 38 S. Ct. 125, 62 L. Ed. 292, 1917). The Fourteenth Amendment does not permit a party to bring to the test of a decision every ruling made in the course of a trial by a state court (*Buchalter* v. *New York*, 319 U. S. 427-430, 63 S. Ct. 1129, 87 L. Ed. 1492, 1943).

Every contention raised by plaintiffs goes to procedural rulings or evidentiary questions which were raised by plaintiffs during trial or in their post trial motion and which were again raised in the Appellate Court on review of those rulings. The Fourteenth Amendment does not assure either uniformity of state court decisions or freedom from error (*Milwaukee Electric Ry. and Light Co.* v. *Wisconsin ex rel. Milwaukee*, 252 U. S. 100-106, 40 S. Ct. 306, 64 L. Ed. 443, 1920; *Worcester County* v. *Riley*, 302 U. S. 292-299, 58 S. Ct. 185, 82 L. Ed. 268, 1937). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question (*Beck* v. *Washington*, 369 U. S. 541-555, 82 S. Ct. 955, 8 L. Ed. 2d 98, 1961).

Petitioners contend that the Appellate Court fell into error by misapplying or misapprehending Illinois law. Their contention that they are thus entitled to a writ of certiorari runs athwart the well established construction of the Fourteenth Amendment that a mere erroneous decision of a state court in the regular course of a judicial decision does not deprive the unsuccessful party of due process of law (*American Ry. Express Company* v. *Kentucky*, 273 U. S. 269-273, 47 S. Ct. 355, 71 L. Ed. 639, 641, 1927).

As previously noted, no contention is made by petitioners that they were denied adequate representation or they were not fully heard in the Illinois courts. Where the parties

have been fully heard in a state court in the regular course of judicial proceedings an erroneous decision of the court does not deprive them of due process of law (*Bonner* v. *Gorman,* 213 U. S. 86, 91, 29 S. Ct. 483, 53 L. Ed. 706, 1908; *Central Land Co.* v. *Laidley,* 159 U. S. 103-112, 16 S. Ct. 80, 40 L. Ed. 91, 1894; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450, 44 S. Ct. 197, 68 L. Ed. 382, 1923).

The due process clause does not control mere forms of procedure in state courts; all of its requirements are met where, as here, a party had sufficient notice and an adequate opportunity to be heard (*Holmes* v. *Conway,* 241 U. S. 624-631, 36 S. Ct. 681, 60 L. Ed. 1211, 1915).

Petitioners do not present a federal question, since the issue they raise is merely that the Appellate Court made an erroneous decision, a claim which will not merit the issuance of a writ of certiorari (*Bell Telephone Co.* v. *Pennsylvania Public Utility Co.,* 309 U. S. 30-32, 60 S. Ct. 411, 84 L. Ed. 563, 565, 1939).

The two cases relied upon by petitioners (*Kent* v. *U. S.,* 383 U. S. 527, 1966; *ReGault,* 387 U. S. 1, 1967) have no application whatsoever. In *Kent* a ward of the Juvenile Court of the District of Columbia had both the statutory and constitutional right to a hearing by that Court as to whether it would waive jurisdiction over him so that he might be tried in the U. S. District Court upon a criminal charge. The Juvenile Court had arbitrarily denied his motion for a hearing. This Court held that the action of the trial court was improper.

In *ReGault,* 387 U. S. 1 (1967) a Juvenile Court in Arizona had committed a 15 year-old defendant to be confined in a state industrial school until he should be 21. This Court held that the action of the Juvenile Court to be in violation of the Fourteenth Amendment, since (1) the minor did not receive adequate notice of the Juvenile Court

proceeding, (2) he was denied the right to be represented by counsel at the hearing, (3) his right against self incrimination was infringed upon.

Petitioners were fully heard in the trial court and the Appellate Court upon all issues submitted by them and they do not argue to the contrary. They were represented at all times by a competent lawyer and brought their suit through their father as their next friend.

II.

AN EXAMINATION OF EACH OF THE ISSUES RAISED BY PETITIONERS SUSTAINS RESPONDENTS' CONTENTIONS THAT ALL RELATE TO ALLEGED IMPROPER RULINGS BY THE TRIAL JUDGE AND THE APPELLATE COURT AND THAT NONE OF THEM RAISE ANY QUESTION THAT PETITIONERS WERE DENIED THE RIGHT TO BE HEARD OR THE RIGHT TO BE REPRESENTED BY COUNSEL.

Petitioners, at p. 6 of their petition, submit five instances in which they claim they were "'deprived of their right to a fair trial and the equal protection of the laws''.

Issues 1 and 2 are similar. They refer to what petitioners regard as unnecessary references to religion at the trial. These issues were called to the attention of the trial judge and raised in petitioners' motion for new trial (Rec. 2940-2955; Abs. 1085-1106), which was denied (Rec. 326-327; Abs. 29). The same issues were submitted to the Appellate Court and found wanting.

Both of the foregoing issues were closely examined by both the trial and Appellate Courts to be unfounded in the evidence and unwarranted under the procedural law of Illinois. None involved the basic issues of whether petitioners were represented by counsel and had been given the right to be heard.

Issue No. 3 is that the trial court and Appellate Court should not have disregarded "cumulative error" in determining whether petitioners were entitled to a new trial. But again the issue was clearly a question of law determined by the trial court and the Appellate Court to be unfounded in the law of evidence and procedure in Illinois, and having no relationship whatsoever to whether petitioners were represented by counsel or were given the right to be heard.

Issue No. 4 is that the trial court and Appellate Court sanctioned argument that a brain-damaged child should be compelled to "be present *throughout* a three—week trial so that he might be observed by the jury". It is significant that nowhere do petitioners submit a record or abstract reference that respondents made statements of that nature to the jury. Neither can they, because the record is bereft of a syllable that statements of that nature were made to the jury. Furthermore even if there were a factual basis for the issue (which is not the case), it would be merely an evidentiary or procedural one under Illinois law and one of law having no relationship with whether petitioners had a right to be heard or to be represented by counsel.

Issue No. 5 is that the Appellate Court has applied adult standards to minors in the review of court proceedings. The issue tendered is ambiguous and is made even more ambiguous by the failure of petitioners to argue it at any place in their petition, so that it might be clarified. It is difficult for respondents to reply to an ambiguous issue which they do not even clarify with argument.

If petitioners mean that in Illinois appellate procedure, the Appellate Court has followed the same standard that it does in cases involving adults, then that would be merely an issue of Illinois law resolved against petitioners by the Appellate Court. The only thing clear about the issue as

tendered is that it does not involve whether petitioners were given the right to be heard or be represented by counsel.

III.

THAT THE CASE WAS TRIED FAIRLY WAS AN ISSUE OF LAW DECIDED ADVERSELY TO PETITIONERS BY THE APPELLATE COURT.

The Appellate Court concluded: "We do not feel that plaintiffs were prejudiced in this case by arguments of defense counsel when the record is reviewed as a whole". (p. 4a)

Even had the Appellate Court been mistaken in its conclusion, it would have been no more than an error of law, and, thus, will not warrant this court granting a writ of certiorari.

However, respondents feel that, while not obliged to go further and belabor an issue that will not warrant this court to grant certiorari, the following comments should be made to demonstrate that the conclusion of the Appellate Court was on firm grounds and that petitioners' charges have been made unfairly and are utterly groundless.

The record shows beyond peradventure of doubt that it was petitioners, not respondents, who initiated and introduced the religious element into the case. In his opening statement petitioners' attorney told the jury that plaintiffs attended a Hebrew parochial school and gave an elaborate description of the curriculum (Rec. Add. Abs. 1-2). He even informed the jury that at the time of the accident petitioner Joseph Hendler was wearing a yamulka, the traditional Jewish skull cap, under his snow suit (Add. Abs. 1-2).

At the time of trial, petitioner Esther Hendler (who was a witness), was 15 years old. Four teenage girls testified for petitioners: two were age 14 (Rec. 449, 499; Abs. 45, 62) and two were age 12. (Rec. 597, 715; Abs. 94, 136).

It was not necessary to qualify Esther Hendler and the two witnesses who were 14, and show that they understood the difference between right and wrong and what it means to tell the truth because of their age. (*Shannon* v. *Swanson*, 208 Ill. 52, 54-55, 69 N. E. 869). Neither was it necessary to qualify the two who were 12, because defendants made no objection to their qualifications.

Petitioners, nevertheless, repeatedly and unnecessarily examined each of these witnesses in detail, showing the Jewish schools they attended; that they learned prayers in Hebrew; that they studied the bible and Jewish law and other details of their Jewish curriculum; and that they were taught to tell the truth. (Rec. 449, 454, 598, 601, 715, 716, 724; Abs. 45, 47, 94, 95, 137, 139).

Twice respondents' attorneys objected vehemently to petitioners' examination of the witnesses upon those subjects (Rec. 453, Abs. 46; Add. Abs. 9-10). In the face of our showing that Illinois law did not require witnesses of that age to be proved to be qualified, each time objection was made petitioners' attorney insisted that the testimony was competent, assigning the utterly improper ground that it related to the credibility of the witnesses and their understanding of an oath (Rec. 453; Abs. 46). The court overruled respondents' objections.

In his closing argument, plaintiffs' counsel appealed to the jury to believe his witnesses upon the basis of this "background," as compared to the other witnesses in the case (Rec. 2737; Abs. 971), thus continuing to bring to the attention of the jury the matter of the plaintiffs' religion.

In so doing, petitioners gave scant heed to the well-stated view of the Illinois Appellate Court that, "The unnecessary injection of religious or political questions into a case diverts the jurors from judicial consideration of the facts and the law regardless of whether their response may be friendly or antagonistic." (*Bulleri* v. *Chicago Transit Authority*, 41 Ill. App. 2d 95, 190 N. E. 2d 476, 479.)

In these circumstances, it seems astounding that petitioners now boldly complain that respondents injected a religious issue into the case when it was petitioners who did so. It is no wonder that the Appellate Court rejected petitioners' issue that respondents injected a religious issue into the case, and that the Illinois Supreme Court denied their petition for leave to appeal.

With the foregoing background we will examine the specific instances in which petitioners claim that respondents improperly injected a religious issue into the case and that the trial court and Appellate Court failed to protect minor litigants.

A.

Petitioners complain of remarks during the trial by respondents' attorneys that two of respondents' witnesses (Levey and Berzon) were of the same religious faith as petitioners. They also claim that there is nothing in the record to show the religion of either witness. The latter claim is without merit, since the record shows that Levey had been a schoolmate of petitioners' brother, who had the same kind of a Hebrew parochial education as his sister, petitioner Esther Hendler (Rec. 2152, 2785; Abs. 701, 1065).

It is amazing that petitioners, having introduced into the case the religious background of their own witnesses as a test of credibility, over the objections of respondents, should now complain that respondents informed the jury that two of their witnesses were of the same background.

If the two witnesses were of the same religious faith as petitioners, they may not complain of the same argument of credibility which they have advanced for their own witnesses. On the other hand, if the two witnesses were not of the same religious faith as petitioners, the statements made by respondents' attorneys were completely harmless.

If, in fact, religion is as irrelevant in this case as plaintiffs now on appeal concede, plaintiffs could not have been prejudiced by the statement that certain of respondents' witnesses were of the same religion as petitioners and their principal witnesses, irrespective of what the actual fact may have been.

In their petition, p. 9, petitioners have quoted from the Appellate Court opinion in a misleading way, so as to make it appear that when the Appellate Court stated "Certainly much of this was improper," the court was directing its remarks solely or particularly to the claims regarding Levey and Mrs. Berzon. *To do this petitioners omit 19 lines of the opinion from their quotation.* (Opinion, pp. 4a-5a), and change the letter "C" in "Certainly" to lower case (c).

Such artful quotation is not a proper method of seeking a writ of certiorari.

The Appellate Court correctly held (Opinion, p. 5a):

> "We do not feel that the plaintiffs were prejudiced in this case by the arguments of defense counsel when the record is reviewed as a whole."

B.

Equally groundless is petitioners' claim that respondents' attorneys told the jury that there was a conspiracy against their clients by members of the Jewish faith.

All that respondents' counsel did was to comment that there had been a meeting at the Arie Crown School at

which a group of petitioners' witnesses was present. Petitioners improperly infer that respondents' attorneys thereby injected a religious issue into their arguments, for no other reason, as petitioners claim, than that the Arie Crown School is one conducted under Jewish auspices, and that the meeting of the witnesses happened to have been held there.

Petitioners do not question the general right of attorneys to comment upon a meeting of the witnesses in any case. In other words, if the same meeting had been held in a law office or in a home, then according to petitioners' reasoning, the charge of "conspiracy by people of the Jewish faith" would not have existed. But, if you change the locale of the meeting to a parochial school, respondents' attorneys could not even so much as mention the meeting. To have done so would be to charge "a conspiracy by people of the Jewish faith," and introduce religion into the case, by petitioners' line of reasoning.

Petitioners opened the subject of the meeting at the school in their direct examination of one of their witnesses, who, at the instance of plaintiffs' attorney, testified that people had come to see her at school and that she was interviewed (Rec. 611; Abs. 98). Another of petitioners' witnesses testified upon direct examination that after the occurrence she was interviewed. (Rec. 517-518; Abs. 69.)

The cross-examination of two witnesses (quoted in petitioners' petition, pp. 11-13) merely went to the interviews and developed that at those interviews, a representative of petitioners was present and that various children were interrogated. Petitioners having opened the subject upon direct examination, it was clearly proper for respondents' attorneys to go into it upon cross-examination and comment on it in argument.

C.

The final claim by petitioners that respondents' attorneys injected a religious issue into the case involves the direct examination of respondent, Miriam Wolozin, who remarked that ninety per cent of the neighborhood was Jewish. This remark was made during repondents' side of the case long after petitioners on their side of the case had saturated the trial with testimony about the religion of petitioners and four of their witnesses.

CONCLUSION.

Respondents submit that the petition for a writ should be denied and they pray that this Court shall so order.

Respectfully submitted,

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